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Vimala Sangari a/p R Nathan v Loh Chen Yook

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02(NCVC)(A)-215–01 OF 2017
HAMID SULTAN, ABANG ISKANDAR AND HASNAH HASHIM JJCA
10 NOVEMBER 2017

C *Land Law — Caveats — Removal — Appellant purchased property under judicial sale — Respondent lodged caveat to protect interest in property — Aggrieved person — Whether caveat should be removed — National Land Code s 327 —*

D The appellant had purchased property under judicial sale pursuant to the National Land Code ('the NLC'). The respondent had initially purchased the said property under a sale and purchase agreement executed six years prior to the judicial sale and had lodged a caveat to protect his interest in the property. In the High Court, the learned judge had refused to allow the removal of the E caveat lodged by the respondent. The appellant appealed against the decision of the High Court judge. The appellant submitted that it was wrong for the learned High Court judge to have refused to remove the caveat when the caveat pursuant to well established case laws was sterile in nature as the respondent upon entering the caveat had not taken any steps to perfect his title or his F interest in the said property simultaneously.

Held, allowing the appeal with costs here and below, subject to allocator and setting aside judgment of the High Court:

G (1) On the facts of the case and based on cited cases, the court took the view that the caveat lodged by the respondent ought to be removed by any person who had locus to remove the caveat under s 327 of the NLC (see para 9).

H (2) The appellant had produced the certificate of judicial sale and in consequence, he fell into the category of aggrieved persons who has the locus to make an application under s 327 of the NLC to remove the caveat (see para 10).

(3) The trial judge had erred in law in refusing or failing to remove the sterile I caveat in limine on the application of the appellant (see para 10).

[Bahasa Malaysia summary

Perayu telah membeli hartanah di bawah jualan kehakiman menurut Kanun Tanah Negara ('KTN'). Responden pada mulanya telah membeli hartanah

tersebut di bawah perjanjian jual beli yang disempurnakan enam tahun sebelum jualan kehakiman itu dan telah memasukkan kaveat untuk melindungi kepentingannya dalam hartanah tersebut. Di Mahkamah Tinggi, hakim yang bijaksana enggan membenarkan pembatalan kaveat yang dimasukkan oleh responden itu. Perayu telah merayu terhadap keputusan hakim Mahkamah Tinggi itu. Perayu berhujah bahawa ia adalah salah untuk hakim Mahkamah Tinggi yang bijaksana untuk enggan membatalkan kaveat itu apabila kaveat itu menurut kes undang-undang yang mantap tidak berubah sifat kerana responden apabila memasuki kaveat tidak mengambil apa-apa langkah untuk memperbetulkan hak milik atau kepentingannya dalam hartanah tersebut secara serentak.

Diputuskan, membenarkan rayuan dengan kos di sini dan di bawah, tertakluk kepada alokator dan mengetepikan penghakiman Mahkamah Tinggi:

(1) Berdasarkan fakta kes dan berdasarkan kes-kes yang dipetik, mahkamah berpendapat bahawa kaveat yang dimasukkan oleh responden patut dibatalkan oleh mana-mana orang yang mempunyai locus untuk membatalkan kaveat itu di bawah s 327 KTN (lihat perenggan 9).

(2) Perayu telah mengemukakan perakuan jualan kehakiman dan akibatnya, dia terjatuh dalam kategori orang yang terkilan yang mempunyai locus untuk membuat permohonan di bawah s 327 KTN untuk membatalkan kaveat (lihat perenggan 10).

(3) Hakim perbicaraan terkhilaf dari segi undang-undang kerana enggan atau gagal membatalkan keveat sedia ada itu in limine berdasarkan permohonan perayu (lihat perenggan 10).]

Notes

For cases on removal, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2771–2774.

Cases referred to

Damai Jaya Realty Sdn Bhd v Pendaftar Hakmilik Tanah, Selangor [2015] 2 MLJ 768, CA (refd)

Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)

Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd [1992] 2 MLJ 650, SC (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223, CA (refd)

Noratahar bin A Hamid v Abdullah bin Hassan & Ors [2012] MLJU 144; [2012] 1 LNS 122, HC (refd)

Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463, CA (refd)

RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors [1980] 1 MLJ 248 (refd)

Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd) [2016] 2 MLJ 819, CA (refd)
Wong Kok Leong & Anor v RHB Bank Bhd [2015] 2 MLJ 385, CA (refd)
Wu Shu Chen (sole executrix of the Estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487, CA (refd)

Legislation referred to

National Land Code ss 256, 259, 327

Appeal from: Originating Summons No 24NCVC-289–10 of 2016 (High Court, Seremban)

Manian Raju (Zatul Izra bt Zulkefelee with him) (Krishna Dallumah, Manian & Indran) for the appellant.
Balraj Singh (Nora Hayati Raj) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/purchaser of a property under the judicial sale pursuant to the National Land Code ('the NLC') appeals against the decision of the learned High Court judge who refused to allow a private caveat lodged by the respondent.

[2] The respondent had purchased the said property under a sale and purchase agreement executed six years or more before the judicial sale. The respondent has also not paid the full purchase price. The said sale and purchase agreement was a conditional sale and purchase agreement where the state authority consent must be obtained. The said condition reads as follows:

> Tanah yang diberimilik ini tidak boleh dipindahmilik, dipajak, digadai melainkan dengan kebenaran bertulis daripada pihyak berkuasa Negeri.

[3] On the date of hearing of the appeal, the learned counsel for the respondent brought to the attention of the court that the appellant in his application for removal of the caveat did not produce the certificate of judicial sale. The learned counsel for the appellant conceded that the certificate of judicial sale was not disclosed and undertook to produce the same. The learned counsel agreed not to object on that issue if the certificate was produced.

[4] After hearing the parties, we adjourned our decision to enable the appellant to produce the judicial certificate and also for the parties to submit further on the phrase 'aggrieved party' stated in s 327 of the NLC as the learned judge had specifically ruled that the appellant was not an aggrieved party under the said section to give her the locus to make the application which read as follows:

327 Removal of private caveats by the Court.

(1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

JURISPRUDENCE RELATED TO 'AGGRIEVED PERSON'

[5] The dictionary meaning of 'aggrieved person' as a general rule appears to be multifold. In the context of specific legislation, courts have given a special meaning to the word 'aggrieved person' in the context of the particular legislation as a whole. One common threshold which appears to run through most of the judicial meaning of 'aggrieved person' is that the person must be directly affected in his subsisting or acquired right by the conduct of third person and the law protects the said subsisting or acquired right. It cannot relate to a future right or prospective right, etc. For example, (a) the dictionary meaning of the aggrieved persons reads as follows:

(i) *Black's Law Dictionary* defines 'aggrieved' as having suffered loss or injury, damnified or injured; and 'aggrieved party' as one whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. One whose right of property may be established or divested. The word 'aggrieved refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation;

(ii) some of the legal meaning of an aggrieved person in relation to legislation or case laws reads as follows:

(1) in *Wu Shu Chen (sole executrix of the Estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487, the Court of Appeal observed:

> The Code contains no definition on who is an aggrieved person. *To my mind, the word 'aggrieved' must be given its ordinary meaning*. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. *An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.*

(2) the Privy Council case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212, as per Lord Diplock observed:

> *It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.*

(3) *RAP Nathan v Haji Abdul Rahman bin Haji Yusoff & Ors* [1980] 1 MLJ 248 the court observed:

> The next point is whether the third defendant is a person aggrieved by the existence of the caveat as provided under s 327(1). *A pertinent question that arises is whether he will suffer loss if the caveat lodged by the plaintiff is not removed.*

(4) quite recently, Harmindar Singh Dhaliwal JC (as His Lordship then was) in the case of *Noratahar bin A Hamid v Abdullah bin Hassan & Ors* [2012] MLJU 144; [2012] 1 LNS 122:

> *In the instant case, however, the plaintiff had produced evidence that he had paid the full purchase price through a letter by Bank Muamalat Malaysia Bhd, the chargee bank, dated 22 July 2011. This was also supported by a 'Perintah Jualan oleh Mahkamah' issued by the senior assistant registrar of the High Court Ipoh which was the Borang 16F of the NLC issued after property was sold at a court auction. So in effect, the plaintiff was an aggrieved person in that if not for the caveats, the plaintiff would have succeeded in becoming the registered owner of the said land.*

BRIEF FACTS

[6] The brief facts of the instant case in our own words can be summarised as follows:

(a) the appellant has purchased the property in a judicial sale of legal charge of Alliance Bank pursuant to s 256 of the NLC.

(b) the respondent has prior to the judicial sale had entered into a conditional sale and purchase agreement dated 22 November 2011 to purchase the said property for the sum of RM2,500,000 and had only paid a sum of RM500,000.

(c) The respondent had not paid the balance purchase price or discharge the legal charge of Alliance Bank, but had placed a caveat on or about 24 November 2011 to protect his interest on the said property.

[7] The memorandum of appeal, inter alia, reads as follows:

1. Pesuruhanjaya Kehakiman tersilap dari sisi undang-undang dan/atau fakta apabila memutuskan bahawa kaveat yang dimasukkan oleh Responden/Defendan ke atas tanah bawah Hakmilik Geran PN 11243, Lot 6128, Mukim Si Rusa, Daerah Port Dickson, Negeri Sembilan Darul Khusus (selepas ini dirujuk sebagai 'hartanah tersebut') harus dikekalkan.

2. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Perayu/Plaintif telah membeli hartanah tersebut melalui lelongan

awam yang diadakan oleh Mahkamah Tinggi Seremban pada 18 Oktober 2016 yang merupakan 'judicial sale'. A

3. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Perayu/Plaintif telah mendapat hak milik yang tidak boleh disangkal (*indefeasibility title)* daripada pemegang gadaian Alliance bank *(chargee bank).* B

4. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa pemegang gadaian telah mempunyai kepentingan berdaftar *(registered legal interest)* ke atas hartanah tersebut. C

5. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Responden/Defendan hanya memasukkan kaveat ke atas hartanah tersebut *selep*as hartanah tersebut digadaikan kepada Alliance bank (*chargee bank).* D

6. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Responden/Defendan telah gagal mengambil sebarang tindakan Mahkamah untuk menegakkan tuntutan atau haknya terhadap pemilik berdaftar mcskipun kaveat telah dimasukkan ke atas hartanah tersebut selama 5 tahun. E

7. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa pemegang gadaian dan pembeli *bona fide* di lelongan awam mempunyai kepentingan yang terlebih dahulu *(priority*)daripada pembeli bawah perjanjian jual beli tanah. F

8. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa tarikh penyempurnaan bagi perjanjian jual beli antara Responden/Defendan dan pemilik berdaftar telah luput. G

9. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa Responden/Defendan tidak mempunyai hak *in rem* ke atas hartanah tersebut malahan Responden/Defendan hanya mempunyai hak *in personam* terhadap pemilik berdaftar tesebut. H

10. Pesuruhanjaya Kehakiman tersilap di sisi undang-undang dan/atau fakta apabila gagal mempertimbangkan dengan sewajarnya atau sama sekali bahawa remedi Responden/Defendan telah dinyatakan dalam perjanjian jual beli hartanah tersebut iaitu menuntut ganti rugi daripada pemilik berdaftar. I

[8] It was contended before us by the appellant that it was wrong for the learned High Court judge to have refused to remove the caveat when the caveat

pursuant to well established case laws was sterile in nature as the respondent upon the entering of the caveat has not taken any steps to perfect his title or his interest in the said property simultaneously. Support for the appellant contention can be found in a number of cases, to name a few are as follows:

(a) in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 Court of Appeal, per Gopal Sri Ram JCA (later FCJ), at p 229:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim vigilantibus, non dormientibus, jura subvenient, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable esdebit justitiae, a court may refuse relief to an indolent litigant.

(b) in *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 Court of Appeal, per Gopal Sri Ram JCA (later FCJ), at p 468:

> The importance of timeous institution and prosecution of proceedings in this area of the law is well brought out by the judgment of Sinnathuray J, in the Singapore High Court in *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12. It is a brief judgment and merits reproduction here:
>
> The matter before me is a simple one. Mr KS Chung for the plaintiff has raised five serious points. I need only deal with the last one, the fifth point, that on the subject of delay.
>
> First, I accept he decision in *Plimmer Bros v St Maur* (1906) 26 NZLR 294 In that case, Stout CJ in New Zealand, on an application to remove a caveat, on facts similar to the present case, where the defendant had commenced no action against the plaintiff relating to the land in respect of which a caveat was lodged, referred to several reported cases and said:
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> > It was his duty to commence an action promptly if he considered himself entitled to specific performance ... Here nothing was done for nearly sixteen months, and then a caveat was lodged. More than a month has elapsed since then, and still no action has been commenced. In my opinion, an action for specific performance under such circumstances would be hopeless, and a caveat under such circumstances must be deemed vexatious ..in my opinion, to prevent a man dealing with his property after such a long delay is so inequitable that the court will not lend its assistance to such a proceeding.

(c) in *Damai Jaya Realty Sdn Bhd v Pendaftar Hakmilik Tanah, Selangor* [2015] 2 MLJ 768, in dealing with issues related to judicial sale, observed:

> [5] In the instant case, the certificate of sale and/or order for sale has not been set aside by the respondent and/or other relevant bodies. If the respondent and/or relevant authorities are aggrieved by the order of sale and/or certificate of sale, they have a duty and an obligation to make the necessary application

to the court to set aside the order. However, what they cannot do is refuse to comply with an order of court. In *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, the Federal Court observed:

> It is well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside.

[9] On the facts of the case and based on the cases cited above, we take the view that the caveat ought to be removed by any person who will have locus to remove the caveat under s 327 of the NLC. A number of persons may have locus to remove the caveat provided the person can demonstrate to the court that he is an aggrieved person in law. To be an aggrieved person in law, we take the view that the applicant must demonstrate that his subsisting interest or acquired interest, etc has been violently affected by the presence of the sterile caveat and/or non-sustainable caveat under the law. Support for the proposition is found in a number of cases, to name a few are as follows:

(a) in *Gondola Motor Credit Sdn Bhd v Almurisi Holdings Sdn Bhd* [1992] 2 MLJ 650 Supreme Court, per Harun Hashim SCJ, at p 658:

> At all material times, the option to purchase and the sale and purchase agreement were subject to the registered charge. Shaikh Mohamad was a director of Tg Petri and in turn a director of the respondent and was well aware of the existence of the charge on the subject land. In any event, the fact of registration of the charge is notice to all the world of its existence. Any dealing subsequent to the charge and with notice of the charge, as here, cannot defeat the indefeasible interest of the registered chargee and through him the purchaser at a judicial sale. The error in this case was to ignore the indefeasible title of the chargee and the continuous legal operation of the charge from the moment of its registration up to the completion of the judicial sale and the issue of the certificate of sale.
>
> For the reasons stated, we would allow the appeal with costs here and below. The order of the learned judge is set aside. We order the removal of the caveat.

(b) in *Rohaya bt Ali Haidar v AmBank (M) Bhd (previously known as 'MBf Finance Bhd)* [2016] 2 MLJ 819 where Prasad Abraham JCA (as His Lordship then was), following the principles enunciated in *Gondola*'s case had stated:

> In our present case the earlier purchaser of the said land based on the letters of disclaimers issued by the respondent had their interest (if any) subject to

A the respective charges on the said lands. What the respondent should have done was to take immediate steps to redeem the land in question or part of it but had failed to do so. Therefore it follows that the interest of the purchasers would be subject to the registered charge and to the appellant who acquired the registered and indefeasible interest in the said land when they had paid.

B (c) in *Wong Kok Leong & Anor v RHB Bank Bhd* [2015] 2 MLJ 385, the Court of Appeal held on the facts of the case as follows:

(1) The respondent must comply with s 281 and crystalise his cause of action by filing a suit and obtain a judgment and if necessary proceed C with foreclosure proceedings as set-out in s 281 of the NLC. If he fails to do so and/or if limitation has set in, s 331 will become applicable to provide relief on the facts of this case and s 328(1) of the NLC states that a private caveat shall lapse at the expiry of six years from the time it was lodged (see para 7).

D (2) The appellants need not seek any declaration to get the lien holder's caveat removed and obtain the title to the relevant properties. The limitation issue will only apply to the respondent in respect of ss 281 and 331 of the NLC, as to the cause of action. The appellant was not pursuing a cause of action against the respondents (see para 11).

E (3) A caveat has a specific purpose and is not a cause of action but a quick relief to protect interest (capable of being protected under the NLC) in the land in the nature of a statutory injunction and it is never meant to assist the indolent as in the instant case (see para 13).

F **[10]** We have read the appeal record and able submission of the parties. After giving much consideration to the submission of the learned counsel for the respondent, we take the view that:

G (a) the appellant has produced the certificate of judicial sale issued under s 259 of the NLC and in consequence in law he will fall into the category of aggrieved persons whom we have mentioned earlier and will have the locus to make an application under s 327 of the NLC to remove the caveat; and

H (b) the learned judge erred in law in refusing or failing to remove the sterile caveat in limine on the application of the appellant;

[11] For reasons stated above, we allow the appeal with costs here and below, I subject to the allocatur. The judgment of the High Court is set aside. The prayers in the application of the appellant are allowed.

We hereby order so.

Appeal allowed with costs here and below, subject to allocator; High Court judgment set aside.

Reported by Fatin Mohd Ismail